

REMARKS

After the foregoing amendment, claims 11-13 are cancelled as duplicative, joining claim 2 which remains cancelled. Claims 1, 2-10, and 14-20 remain as previously presented in the application.

Claim Rejections Under 35 U.S.C. § 102(b)

The examiner has rejected claims 1, 3, 6, 8, 11, and 12 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 6,525,298 issued to Hunts (hereinafter *Hunts*). Specifically, the examiner stated with regards to claims 1, 3, 8, 11, and 12:

Hunts discloses a towel warming device having a drawer frame (1) with a pair of side rails (Figure 1, two side walls, connecting element 5 to the wall opposite the door), a door (2) moveably connected to the front of the side rails to be positioned between an open and closed position, a removable tray (7) capable of holding food, and a locking mechanism (4, 5) in connection between the side rails and the door.

In addition, the Examiner stated:

Regarding claim 6, the door is hingedly connected to the side rails proximate the front end thereof (col. 6, line 41).

The Examiner's rejection is respectfully traversed. Anticipation under § 102(b) requires that *each and every element* of the claim be taught. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987) ("A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference."). "The identical invention must be shown in as *complete detail* as is contained in the ... claim." *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989) (emphasis added). An element-by-element analysis of the claims as previously amended reveals why the Examiner's rejection should be reconsidered.

Claims 1-13

Drawer Frame

Claim 1 includes, *inter alia*, a drawer frame which is described within the specification and designated in the drawings as numeral 38. Several characteristics of a “drawer frame” are as follows:

“Drawer frame 38 is moveably connected to the cabinet 12 so as to allow drawer 38 to be movable from a closed position, wherein drawer frame 38 is positioned within heated cavity 28, to an open position wherein drawer frame 38 extends from cabinet 12 and heated cavity.” (Paragraph [0023])

“Drawer frame 38 includes a pair of opposing side rails 44, 46 that are slidably connected...” (Paragraph [0029])

“Drawer frame 38 may further include a front support 52 and/or a back support 54...” (Paragraph [0030])

The definition previously provided by the applicants provides that a “drawer” is a “boxlike compartment ... that can be pulled out and pushed in.” A “drawer frame” would therefore constitute the “frame” of the “drawer.” One aspect of a “drawer” as commonly known is that a drawer generally features an open top for allowing contents to be stored within the four walls of the “drawer frame.”

The Examiner claims that the enclosure 1 described by *Hunts* is a “drawer” because “the Hunt [sic] boxlike compartment (1) is capable of being pushed out or pulled in if so desired” as a “drawer.” The Applicants respectfully disagree with the Examiner’s proposition that the enclosure 1 in *Hunts* is like a drawer, because it lacks all of the traits associated with commonly known “drawers.” Assuming, *arguendo*, the *Hunts* enclosure 1 is a boxlike compartment, *Hunts* does not disclose any larger object that would serve as a holder from the drawer allowing the enclosure 1 to be pushed in and pushed out. For at least this reason, *Hunts* does not disclose a drawer.

Although not included in the “dictionary definition” of drawer, it is common knowledge that a drawer should feature a storage area with a substantially open top, or some type of removable lid¹. The fundamental concept behind a drawer is that the contents within the drawer are held within and inaccessible until the drawer is at least partially “pulled out,” thereby allowing the contents to be removed. Placing the *Hunts* enclosure 1 within a larger structure fails to accomplish this fundamental purpose, as the *Hunts* enclosure may only be accessed by pulling the door 2 down. (See *Hunts*, Col. 3, ll. 58-60) Therefore, the *Hunts* enclosure 1 lacks essential qualities that would constitute a “drawer” as claimed by the applicants.

For the foregoing reasons, *Hunts* fails to disclose a “drawer frame” as used by the Applicants, and as interpreted by a person having ordinary skill in the art.

Side Rails

Claim 1 includes inter alia, the drawer frame having a pair of opposing side rails, each of the side rails having a terminal end and a front end. As with the claimed “drawer,” *Hunts* fails to disclose any side rails having a front end and a terminal end. The examiner’s reference to the exterior walls of the enclosure 1 of *Hunts* fails to disclose “rails” as would be understood in view of the current application by someone of ordinary skill in the art. Therefore, *Hunts* fails to disclose “side rails.”

Removable food tray

Hunts also fails to disclose either a “removable tray” or a “food tray,” much less a *removable food tray*. With regard to a “food tray,” the “shelf [or baffles] 7 having air passages therethrough in a form of perforations” is not a “food tray” as is generally understood or defined by the applicants. A “food tray” is defined within the specification as follows:

“Food tray 42 may be constructed of materials such as aluminum, stainless steel or other suitable sanitary and heat tolerable material acceptable for food preparation and food service. Food tray 42 may be a shallow or deep type tray. Food tray 42 is adapted to

¹ *Merriam-Webster Online* (<http://www.m-w.com>) 1. /dɪəl also 'drɔ/ : a sliding box or receptacle opened by pulling out and closed by pushing in.

contain a food product (not shown) for heating the food product or maintenance of the heat of the food product.” (Paragraph [0025])

Commonly one or more recessed “compartments” or “troughs” for containing food does not define a food tray. Therefore, “air passages” as such would be contrary to the purpose of a food tray by allowing heated foods to seep through the holes of the tray. While the shelf of *Hunts* may hold food, it is not a food tray as commonly known. The Examiner is invited to present evidence of a “food tray” that closely resembles the shelf 7 of *Hunts*, but such a food tray is unlikely to exist and would be contrary to the Applicants’ “food tray.”

The Examiner also dismisses the Applicants’ argument that the *Hunts* tray is not a removable tray, stating “it is capable of being removed from the surrounding structure.” Assuming, *arguendo*, the *Hunts* shelf 7 is a food tray, there is no suggestion that it is removable. “Removable” implies that the “food tray” can be removed with few, if any tools, and quickly. The *Hunts* shelf 7 cannot be removed easily as it appears to be permanently secured within the enclosure 1. When a removable element is claimed, it is improper to reject the claim under § 102(b) simply because the element as shown in the prior art is “capable of being removed.” A proper § 102(b) rejection requires the prior art to either explicitly or inherently disclose the particular limitation, i.e. a removable shelf.

With regard to the *Hunts* reference, the Examiner has essentially argued that the features are “inherent”, i.e. an enclosure with a solid, sealed top is a drawer; that walls are side rails; and that a shelf with air passages is a food tray. However, it is the burden of the Examiner to establish that the *Hunts* reference features the claimed elements inherently. See *Ex parte Levy*, 17 U.S.P.Q.2d 1461, 1464 (Bd. Pat. App. & Inter. 1990). The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. *In re Rijckaert*, 9 F.3d 1531, 1534, 28 U.S.P.Q.2d 1955, 1957 (Fed. Cir. 1993) (reversed rejection because inherency was based on what would result due to optimization of conditions, not what was necessarily present in the prior art); *In re Oelrich*, 666 F.2d 578, 581-82, 212 U.S.P.Q. 323, 326 (C.C.P.A. 1981). “In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the

teachings of the applied prior art." *Ex parte Levy*, 17 U.S.P.Q.2d at 1464 (Bd. Pat. App. & Inter. 1990) (emphasis in original). Accordingly, there is nothing within *Hunts* that discloses or supports the Examiner's contention under inherency that the enclosure 1 is necessarily a "drawer", that the side walls are necessarily side rails, or that the shelf 7 necessarily operates as a "food tray."

The aforementioned arguments are applicable to claims 1, 3-10, all of which rely, directly or indirectly, on claim 1. Therefore, the Examiner's rejections directed toward those claims are respectfully traversed, including those rejections under § 103 that rely on the *Hunts* reference to disclose the aforementioned limitations. As *Hunts* fails to disclose several limitations of claim 1, the Examiner must set forth a prima facie case for obviousness by identifying one or more additional references that teach the missing limitations and meeting the other requirements for the prima facie case.

Claims 14-17

Claims 14-17 are directed toward a food warmer oven. The Examiner has rejected claims 7, 13-15 and 18 under 103(a) as being unpatentable over Koch, United States Patent No. 574,336, (hereinafter *Koch*) in view of Shei, United States Patent No. 6,175,099, (hereinafter *Shei*)² and Roberts, United States Patent No. 2,719,770 (hereinafter *Roberts*). Specifically the Examiner stated:

Koch describes a stove having a cabinet (1) having opposing side walls, a top wall, a bottom wall, a back wall, and a front wall defining a heating cavity (see "stove" col. 1, lines 49-51), the front wall defining an opening into the heating cavity; a heating source disposed within the heating cavity (see "stove" col. 1, lines 49-51); a drawer frame (9) having a pair of opposing side rails (14), each of the side rails having a front end and a terminal end (Fig. 1), the side rails being functionally connected with the side walls of the cabinet in a manner such that the drawer frame can be moved between an open position ("open" in Figure 1) wherein the drawer frame extends substantially exterior of the heating cavity through the opening and a closed position (Figure 2) wherein the drawer frame is positioned substantially within the heating cavity (col. 2, lines 71-73), the front end of the side rails being positioned proximate the front wall and the terminal end being

² The Examiner cites "Shei et al 6,644,298." However, United States Patent No. 6,644,298 was issued to Hermansen *et al* for a "Portable Barbeque Grill." It is believed the Examiner intended to refer to Shei *et al*, United States Patent No. 6,175,099.

positioned proximate the back wall when the drawer frame is in the closed position (Figures 1 and 2); a door (20) moveably connected to the side rails of the drawer frame, the door moveable between an open position and a closed position; and a locking mechanism (13, 22, 24) in connection between the door and the side rails of the drawer frame for selectively maintaining the door in the closed position.

Regarding claim 15, Figure 2 shows the door closed, and the opening is substantially sealed.

(Final Office Action, paragraphs 14-15)

With regard to claims 7 and 13, the Examiner has failed to establish that *Koch* teaches each and every element of claim 1, upon which both claims 7 and 13 are dependent. Claim 13 is presently canceled rendering any argument of patentability moot. With regard to pending claim 7, it is inapposite that *Koch* in view of *Shei* can disclose or suggest each and every element of claim 7 without disclosing or suggesting the broader claim 1. However, the Examiner never distinctly pointed out those aspects of *Koch* and *Shei* that anticipate claims 1 and 7 or render the aforementioned claims obvious under § 103. Without such specific details and a proper analysis under either § 102 or § 103, the applicants are unable to adequately respond. For these reasons, applicants consider Examiner's arguments directed toward claim 7 as failing to comply with the standards set forth in the CFR and MPEP for rejection under either § 102 or § 103. Therefore, Applicants submit that Claim 7 is patentable over the cited art without any additional argument or consideration. If the Examiner is not persuaded by the other arguments contained herein, the Applicants reserve the right to amend claim 7 to overcome the objection that the claims are dependent on a rejected claim (claim 1).

The Examiner's remaining rejections directed toward claims 14-17 rely primarily on *In re Kuhle*, 526 F.2d 523, 188 U.S.P.Q. 7 (C.C.P.A. 1975) for support that rearrangement of parts is not a patentable distinction. Examiner's reliance is on the following statement of the C.C.P.A.: "[T]he particular placement of the contact provides no novel or unexpected result." *Id* at 555. The C.C.P.A determined that the particular placement of the spring contact was a matter of design choice that did not affect the operation and agreed with the board that the claimed element was "well-known with the common flashlight." *Id*. Moreover, *Koch* discloses a soot collecting drawer in a stove or range which necessarily requires the drawer to be at the bottom of the stove. Therefore, *Koch* teaches away from rearranging the drawer to be placed above the heating

element (the wood burning). Further, without soot being a by-product of the present invention's heating elements, the novel aspects of the *Koch* invention (a soot collector) would be rendered useless, further supporting the notion that *Koch* teaches away from the present invention.

Meanwhile, *Shei* relies on the direct transfer of heat from the heating element through a heat sink to the food trays of *Shei*. (Col. 2, ll. 7-9 “the heat sink concentrates the heat generated by the heater at the tray so as to efficiently maintain the food in the tray at a temperature suitable for serving”) Therefore, *Shei* does not necessitate, and indeed teaches away, from requiring doors to seal the heat within the cabinet. As with the present invention, the use of the soot collecting door of *Koch* would be unnecessary because *Shei* does not produce soot. Further, *Shei* teaches away from using any door mechanism because of the direct heat transfer discussed previously. Therefore, the combination of *Koch* and *Shei* does not render the present invention obvious. The mere ability to combine two references is not sufficient, there must be teaching within the references themselves that teaches, suggests, or motivates a person having ordinary skill in the art to combine the references. *In re Kahn*, 441 F.3d 977, 986, 78 U.S.P.Q.2d 1329, 1335 (Fed. Cir. 2006). Here, there is no teaching, suggestion, or motivation to combine, and indeed the references actually teach away from one another.

Claims 18-20

As previously addressed, *Koch* and *Shei* fail to teach, suggest, or motivate a person having ordinary skill in the art to combine the two references. Accordingly, the “Koch in view of *Shei* et al” apparatus, which is not a proper combination under § 103, cannot anticipate claims 18-20 by performing the identical steps as claimed. The Examiner must overcome the Applicants' response to the § 103 rejection of claims 14-17 before Applicants are able to address whether any combination of *Koch* and *Shei* or others renders claims 18-20 obvious under § 103.

The Examiner has also failed to distinctly identify the aspects of the “Koch in view of *Shei* et al apparatus” that serves to render the claims obvious. In particular, while the improper combination of *Koch* and *Shei* might disclose “providing a food warmer oven comprising ...” the Examiner has failed to suggest that *Koch*, *Shei*, or *Roberts* teaches “manipulating the door to disconnect the door from the drawer frame via the locking mechanism,” “moving the door to the

open position;” removing a food tray from the drawer frame;” “placing a food tray in the drawer frame;” “moving the door to the closed position;” “manipulating the door to secure the door to the door frame via the locking mechanism.” (as recited by claim 18) Further, without particularly pointing out the aspects that render claim 18 obvious in view of *Koch*, *Shei*, and *Roberts*, claims 19-20 cannot be rendered obvious either.

CONCLUSION

Applicants respectfully submit that the Examiner's comments and rejections in reference to *Hunts, Koch, Roberts*, and *Shei* are have all been considered and addressed herein. In view of the arguments contained, Applicants respectfully request the Examiner reconsider and withdraw these rejections and allow independent claims 1, 14, and 18. Applicants further submit that because dependent claims 3-10, 15-17, and 19-20 depend from allowable claims 1, 14, 18, they all are likewise allowable and request that rejection of these claims be withdrawn.

The Applicants encourage the Examiner to call the undersigned at the telephone number indicated below if the Examiner wishes to discuss the claims or has any questions. Applicants believe that no fees are due. However, the Commissioner is hereby authorized to charge any fees or credit any overpayment to Deposit Account Number 010657 of AKIN GUMP STRAUSS HAUER & FELD, LLP.

Respectfully submitted,



Date: February 2, 2007

Ruben C. Deleon
Reg. No. 37,812

AKIN GUMP STRAUSS HAUER & FELD LLP
P.O. Box 688
Dallas, TX 75313-0688
Telephone: (214) 969-2721
Facsimile: (214) 969-4343